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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 31.

MAGNO SANTOVINCENZO, Consul of the Kingdom of Italy at New York,

Appellant,

against

JAMES F. EGAN, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of ANTONIO COMINCIO, Deceased, and JOHN J. BENNETT, JR., Attorney General of the State of New York,

Appellees.

APPEAL FROM SURROGATES' COURT, COUNTY OF NEW YORK, STATE OF NEW YORK.

BRIEF FOR APPELLANT

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Opinion Below.

The opinion of the Surrogates' Court is reported in 135 N. Y. Misc. 733 and 240 N. Y. Supp. 691, and is printed at R. 22-24. The Appellate Division affirmed without opinion, 229 N. Y. App. Div. 862, and no opinion was written in denying leave to appeal to the Court of Appeals.

Jurisdiction.

A statement as to jurisdiction pursuant to Rule 12 was filed herein on March 20, 1931, and reference is respectfully made thereto.

Question Presented.

The underlying and ultimate question in the case is whether the property of an Italian national dying in New York intestate and without relatives passes (*a*) to the State of New York under its statutes, or (*b*) to the Government of Italy under the treaties hereinafter mentioned.

Statutes and Treaties Involved.

The treaties under which the appellant claims are as follows (See R. 6, 7):

(*a*) Consular Convention between the United States and Italy, 20 Stat. 725, 732, Article XVII of which provides (R. 6, 7; 20 Stat. 732):

> "The respective Consuls General, consuls, vice-consuls and consular agents as likewise the consular chancellors, secretaries, clerks or attaches, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favored nation."

(*b*) Treaty between the United States and Persia, 11 Stat. 709, 710, Article VI of which provides (R. 6; 11 Stat. 710):

> "In case of a citizen or subject of either of the contracting parties dying within the territories of the other, his effects shall be delivered up integrally to the family or partners in business of the deceased; *and in case he has no relations or partners, his effects shall be delivered up to the Consul or agent of the nation of which the deceased was a subject or citi-*

zen, so that he may dispose of them in accordance with the laws of his country.''

By the law of Italy the property of one dying intestate and without a spouse or relatives passes ''to the patrimony of the State'' (Italian Civil Code, Book III, Title 2, chapter 1, Section 721, quoted at R. 6).

The pertinent parts of the New York statutes which the courts below have sustained as against the appellant's claim under the treaties are set forth in the *Appendix* to the *Statement as to Jurisdiction* heretofore filed herein. Briefly stated, they are to the effect that money in the hands of the Public Administrator of the County of New York which is payable to unknown persons must be paid into the treasury of the City of New York, and after remaining there for twenty years it is paid to the Treasurer of the State. If no one appears and proves ownership, *i. e.*, where there is a failure of next of kin, the property reverts to the State of New York as an escheat. (See *infra*, pp. 20, 21.)

Statement of the Case.

Antonio Comincio was a native-born Italian subject (R. 17, 21) who died in New York, intestate, leaving no relatives (R. 19). Administration upon his estate was granted to the Public Administrator of the County of New York on March 10, 1925 (R. 7, 9). The administrator thereafter petitioned the Surrogates' Court for a judicial settlement of his account, and in his petition he stated that it appeared from documents filed with him that the decedent left no kin surviving and that the Italian Consul made claim to the estate (R. 8). The appellant, in his official consular capacity, answered the petition, and in his

answer he specially set up the treaties and Italian law above referred to and prayed that the balance of the estate be paid to him for distribution to the Kingdom of Italy (R. 6, 7). The Attorney General of New York was cited as the representative of the State of New York (R. 3).

Upon the hearing before the Surrogate there was testimony to the effect that about five years before his death Comincio had stated that he "wanted to retire and return back to Italy" (R. 21, 22); and appellant accordingly made the further contention that, in view of that declared intention to return to Italy, Comincio never lost his domicile of origin, and that succession accordingly was governed by the law of Italy irrespective of the treaties (R. 22, 23).

The Surrogate took the view, however, that such a vague and indefinite declaration of intention to return was unavailing as against Comincio's long-continued residence in New York, and he therefore *found as a fact* that Comincio's *domicile* was in New York and not in Italy (R. 23, 24).

The Surrogate then ruled that the succession of personal property "is governed exclusively by the law of the actual domicile of the intestate at the time of his death" (R. 23, 24), and he thereupon directed disposal of the estate in accordance with the statutes of New York (R. 24, 4, 5).

That the Surrogate fully understood that the validity of the New York statutes was directly drawn in question upon the ground of their repugnance to treaties of the United States, and that the question before him was whether he should direct distribution in accordance with the treaties or in accordance with the local statutes, is plainly apparent from his opinion. He first stated that under the New York statutes the net estate would be di-

rected to be paid into the treasury of the City of New York and ultimately would find its way into the treasury of the State of New York (R. 22). He then referred to the treaties upon which the appellant relied (R. 22) and stated that the Attorney General of the State of New York opposed appellant's contention (R. 22). Then, after finding as a fact that the decedent was *domiciled* in New York, he stated that the law of the domicile was controlling (R. 23, 24). He then said (R. 24):

> "Citizenship and nationality on the one hand and domicile on the other involve different principles, but succession to personalty is based upon the finding of domicile only. It is beyond comprehension that the treaty between the United States and Persia ever contemplated any abrogation of this basic rule of law. An examination of the provisions of the Persian Treaty and of the Treaty with Italy compels the interpretation that the consular rights were limited strictly to the receipt of the property of a national of Italy dying here, but domiciled in that country. In the comprehensive opinion of Judge CARDOZO in Matter of Adamo (212 N. Y. 214), the rights of the Italian consular officers under the treaty with this country are considered. In that case it was finally settled in the State of New York that our local statutes governed the appointment of administrators and that the treaty conferred no preference to letters of administration upon the Italian consul. Much of Judge CARDOZO's reasoning applies in the present situation. In this proceeding the rights granted by the treaty must be held to be subordinate to the succession statutes of our state."

The Surrogate's decree (R. 3-5) was affirmed by the Appellate Division June 23, 1930 (R. 26). Leave to appeal to the Court of Appeals was denied, first by the Appellate Division, and then by the Court of Appeals itself

(R. 28, 29). The latter denial was on December 2, 1930 (R. 28) and the order of the Court of Appeals was thereafter made the order of the Surrogates' Court on December 15, 1930 (R. 29, 30).

This appeal was then allowed by Mr. Justice STONE on February 25, 1931 (R. 34, 35).

Specification of Errors.

The errors assigned are as follows (R. 33):

1. The State courts erred in sustaining the validity of the statutes of New York with respect to the disposition of the estate of a subject of the Kingdom of Italy dying in New York without relations or partners, as against the claim that under the treaties of the United States the appellant, as Consul of the Kingdom of Italy at New York, was entitled to receive such estate so that he may dispose of the same in accordance with the laws of Italy.

2. The State courts erred in disposing of the estate of a subject of the Kingdom of Italy in accordance with the statutes of the State of New York instead of in accordance with the treaties of the United States.

3. The State courts erred in giving effect to the statutes of New York instead of to the treaties of the United States.

4. The State courts erred in refusing to direct payment of the estate to the appellant as Consul of the Kingdom of Italy at New York.

5. The State courts erred in directing the administrator to dispose of the balance of the estate in his hands in accordance with statutes of the State of New York.

Summary of Argument.

By the treaty with Italy the appellant is entitled to all the *rights, prerogatives,* and *privileges* granted to consuls of the most favored nation. By the treaty with Persia a consul has the right, prerogative, or privilege of having delivered up to him the effects of a subject of his country who dies within the United States without relations or partners "so that he may dispose of them in accordance with the laws of his country." That right applies to all subjects of the consul's country dying here, *regardless of the domicile of the decedent.* Nationality, not domicile, is the test.

Even if it be possible to construe the treaty as being limited to nationals not domiciled here, it is also susceptible of being construed as appellant construes it; and the settled rule as to the construction of treaties thus requires that appellant's construction be adopted.

The treaties are the supreme law of the land, and the local statutes being inconsistent therewith, the statutes are invalid.

Nevertheless, the courts below have directed that the estate be disposed of in accordance with New York statutes under which the property reverts to the State of New York as an escheat, instead of directing that it be delivered to appellant for disposal by him in accordance with the laws of Italy.

The courts below have thereby rendered a decision in favor of the validity of statutes of a State the validity of which was drawn in question on the ground of their being repugnant to treaties of the United States. They have also thereby rendered a decision against the validity

of a treaty of the United States, for the necessary effect of their decree is to sustain the State statutes and deny the rights asserted under the treaties.

POINT I.

Under the treaties of the United States set forth in appellant's answer herein, the appellant was and is entitled to receive the estate of the decedent.

The question in this case is to be carefully distinguished from the much-discussed question of the right of foreign consuls to *administer* the estates of their nationals (*Rocca* v. *Thompson*, 223 U. S. 317; *Matter of D'Adamo*, 212 N. Y. 214). No right of administration is here asserted. The estate is being administered by a local official, created by the statutes of New York, known as the Public Administrator of the County of New York. What is here involved is the *distribution* of the net estate remaining after administration is completed.

A.

The treaty with Italy (*ante*, p. 2) gives to her consuls "all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade of the most favored nation."

The treaty with Persia (*ante*, pp. 2, 3) provides that where "a *citizen* or *subject* of either of the contracting parties dying within the territories of the other" has no relations or partners "his effects shall be delivered up to the consul or agent *of the nation of which the deceased was a subject or citizen* so that he may dispose of them in accordance with the laws of his country."

The word "effects" unquestionably includes personal property of all kinds (19 *Corpus Juris* 1017; *Bouvier's Law Dictionary; Burrill's Law Dictionary; Todok* v. *Union State Bank*, 281 U. S. 449, 453, 454); and by the very words of the treaty, therefore, the property, in the absence of relations or partners, is to be delivered to the consul of the nation of which the decedent was a citizen or subject.

The treaty twice uses the phrase "citizen or subject" and says nothing whatever about domicile. If a citizen of the United States die in Persia, or if a subject of Persia die in the United States, the treaty comes into operation, regardless of whether such citizen or subject was or was not domiciled in the country in which he died. The test laid down in the treaty is *nationality* and *not* domicile; and in making domicile the test the courts below have plainly departed from the plain language of the treaty.

The Surrogate says it is "beyond comprehension" that the treaty ever contemplated any abrogation of "the rule that succession is governed by the law of the domicile." But *why* such abrogation is "beyond comprehension" he does not tell us, and we are at a loss to conceive a reason. On the contrary, it seems to us it cannot be doubted that that was the precise object of the treaty. The law of the domicile, as the Surrogate himself tells us, is controlling in the *absence* of a treaty, and to construe the treaty as not abrogating that rule is to convict the high contracting parties of entering into stipulations which were wholly futile and useless because amounting only to a restatement or declaration of the rule which would apply if there were no treaty.

Treaties generally are made for the purpose of conferring or obtaining some right or privilege not previously existing, and it would require strong evidence to show that

a treaty stipulation was intended as merely declaratory of an existing rule rather than as changing the existing rule. Here the evidence of intent is all the other way.

In the first place, the treaty carefully uses the words "citizen and subject" and refrains from saying anything about domicile, and it certainly cannot be doubted that those who made the treaty understood the meaning of those words and knew that one may be a citizen or subject of one country although domiciled in another.

In the second place, when construed as appellant construes it, the treaty coincides with and furthers the long-standing policy of the United States to have its consuls take possession of the estates of its citizens who die in foreign countries leaving no legal claimant there present and remit the same to this country. That policy is expressed in Section 1709 of U. S. Rev. Stat. (U. S. Code, Title 22, § 75, which originated in an Act of Congress of April 14, 1792, 1 Stat. 255. By the terms of that statute it is made the duty of consuls and vice-consuls of the United States "where the laws of the country permit" to take possession of the personal estate left by *citizens* of the United States, other than seamen belonging to any vessel, who shall die within their consulate "leaving no legal representative, partner in trade, or trustee by him appointed to take care of his effects" and to inventory the same, collect the debts due the deceased in the country where he died, pay the debts due from his estate which he shall have contracted there, sell such part of the property as is perishable and as is necessary for the payment of debts, and "transmit the balance of the estate to the Treasurer of the United States to be holden in trust for the legal claimant."* That

*The statute is quoted in full in the Appendix at p. 23, *infra*.

statute likewise refers to *citizens*, and pays no attention to domicile, and it unquestionably applies to all citizens even though domiciled abroad.

The Surrogate referred to *Matter of D'Adamo*, 212 N. Y. 214, as containing reasoning which supported his view (R. 24); but with one exception to be hereafter noted (*infra*, pp. 16, 17) we submit that, so far as the case is material at all, it sustains appellant's position rather than the position of the courts below.

The question involved in *Matter of D'Adamo* was whether or not a treaty with Sweden gives to foreign consuls a right to *administer* the estates of their nationals dying here even though there be other persons present who, under the local law, are qualified and willing to act as administrator. Rejecting a contrary intimation by this court in *Rocca* v. *Thompson*, 223 U. S. 317, 332, the New York Court of Appeals held that the treaty did not give such right to foreign consuls but merely added such consuls "to the list of those eligible as administrators so as to enable them to administer upon the estates of their fellow-citizens when no one having a prior right under the local law is competent or willing to act" (212 N. Y. 223). The treaty there involved contained the phrase "so far as the laws of each country will permit," and in reaching its conclusion the New York Court of Appeals placed great stress upon that phrase and held that it qualified the entire sentence in which it occurred (212 N. Y. 221-223). *No such phrase occurs in the treaty involved in the case at bar, and for that reason the decision in the D'Adamo case is wholly inapplicable.*

As *confirming* its construction of the Swedish treaty, however, the New York Court of Appeals referred to two circumstances which we submit are quite pertinent as

likewise confirming our own construction of the Persian treaty with which we are now concerned.

The first circumstance so mentioned by the Court of Appeals is that the function of consuls under established international practice is "to preserve derelict estates" (212 N. Y. 223). Now the estate of Comincio certainly is a derelict estate, and in construing the treaty as carrying that estate to the land of his birth, allegiance, and nationality, we certainly are construing it in a manner which harmonizes it with international practice and with the way in which the international negotiators must have understood it. We repeat, too, that it also harmonizes the treaty with the statutorily declared policy of the United States in particular (*supra*, p. 10).

The second circumstance so mentioned by the New York Court of Appeals in the *D'Adamo case* is that strange consequences would follow a different interpretation of the treaty there involved because (212 N. Y. 226):

> "It (the treaty) is not restricted in its operation to the estates of aliens who have died in the United States while temporarily sojourning here, but who have retained a domicile in their native lands. *It applies equally to the estates of aliens who have their domicile in the United States.*"

Now the Swedish treaty, of which that was said, used the phrase "any *citizens* of either of the two Contracting Parties dying without will or testament in the territory of the other Contracting Party" (212 N. Y. 221), precisely as the Persian treaty here involved uses the exactly equivalent phrase "citizen or subject of either of the contracting parties dying within the territories of the other" (I. 6). As, therefore, the Swedish treaty "ap-

plies equally to the estates of aliens who have their domicile in the United States," it follows that the Persian treaty also applies equally to the estates of aliens who have their domicile in the United States.

Rightly considered, therefore, the reasoning in the *D'Adamo case* sustains our contention and directly repudiates the view taken by the Surrogate. Indeed, it furnishes us with a direct statement by an able judge of an able court that nationality and not domicile is the test of the applicability of the treaty.

B.

Even if the treaty be susceptible to the construction placed upon it by the courts below, it certainly cannot be denied that it is *also susceptible to the construction contended for by the appellant;* and that being the case, the latter construction is the one to be adopted.

In *Asakura* v. *Seattle,* 265 U. S. 332, this court said (p. 342):

> "Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."

In *Nielsen* v. *Johnson,* 279 U. S. 47, this court again said (p. 52):

> "When a treaty provision fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred."

In *Jordan* v. *Tashiro,* 278 U. S. 123, this court said (p. 127):

"The principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. See *Geofroy* v. *Riggs, supra; Tucker* v. *Alexandroff*, 183 U. S. 424, 437; *Wright* v. *Henkel*, 190 U. S. 40, 57; *In re Ross*, 140 U. S. 453, 475. Upon like ground, where a treaty fairly admits of two constructions, one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is to be preferred. *Asakura* v. *Seattle*, 265 U. S. 332; *Tucker* v. *Alexandroff*, *supra; Geofroy* v. *Riggs, supra.*"

In each of those cases this court cited with approval *Geofroy* v. *Riggs*, 133 U. S. 258, in which this court had said (pp. 271, 272):

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction *words are to be taken in their ordinary meaning, as understood in the public law of nations*, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Hauenstein* v. *Lynham*, 100 U. S. 483, 487."

The ordinary meaning of the words *citizen* and *subject* as understood in the public law of nations certainly is that they indicate *nationality* or *allegiance*, irrespective of domicile; and in construing the treaty here in question as re-

ferring only to foreign subjects *not domiciled in the United States* (R. 24) the courts below have not given to the words of the treaty "their ordinary meaning as understood in the public law of nations" and, also, have not given them that "liberal interpretation" which enlarges rather than restricts the rights claimed under them.

The Surrogate's opinion gives every indication of an attempt to construe the treaty in a manner which will make it harmonious with the law of New York. Indeed, it fairly may be said that he consciously strained and struggled to that end. But that is not consonant with the principles which this court has declared to be controlling in the interpretation of treaties. Thus, in *Nielsen* v. *Johnson*, 279 U. S. 47, this court said (pp. 51, 52):

> "The narrow and restricted interpretation of the Treaty contended for by respondent, while permissible and often necessary in construing two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which are controlling in the interpretation of treaties. Treaties are to be liberally construed so as to effect the apparent intention of the parties. *Jordan* v. *Tashiro*, 278 U. S. 123; *Geofroy* v. *Riggs*, 133 U. S. 258, 271; *In re Ross*, 140 U. S. 453, 475; *Tucker* v. *Alexandroff*, 183 U. S. 424, 437. When a treaty provision fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred, *Asakura* v. *Seattle*, 265 U. S. 332; *Tucker* v. *Alexandroff*, *supra*; *Geofroy* v. *Riggs*, *supra*, and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must

prevail over inconsistent state enactments. See *Ware* v. *Hylton*, 3 Dall. 199; *Jordan* v. *Tashiro*, *supra*; cf. *Cheung Sum Shee* v. *Nagle*, 268 U. S. 336."

The treaties here in question, properly construed, are applicable to all subjects of a foreign nation dying within the United States, regardless of the domicile of such subject, and under the treaties as so construed the appellant was and is entitled to receive the estate here in question "so that he may dispose of (it) in accordance with the laws of his country".

POINT II.

The treaties constitute the supreme law of the land, and every state statute inconsistent therewith is invalid.

Although parts of the Surrogate's opinion indicate that his decision rests upon his *construction* of the treaties, there are other parts which afford strong evidence that his final conclusion was that if the treaties were inconsistent with the New York statutes then the treaties should yield to the statutes rather than that the statutes should yield to the treaties. That seems manifest from the fact that, after referring to the opinion in *Matter of D'Adamo*, 212 N. Y. 214, and saying that much of its reasoning applies to the present situation, he concluded (R. 24):

> "In this proceeding *the rights granted by the treaty* must be held to be *subordinate* to the succession statutes of our State."

The question in issue in *Matter of D'Adamo*, as already pointed out, was wholly different from the question

presented in the case at bar; but the opinion in that case expresses a doubt as to the power of the United States, by means of a treaty, to change the laws of a State with respect to the administration of the estates of those dying within its territorial limits (212 N. Y. 227, 228). The court pointedly refrained from expressing any opinion upon that subject, but its somewhat extended reference to what "distinguished secretaries of state" had said in disclaiming the existence of such a power in the Federal Government undoubtedly had its effect upon the mind of the Surrogate, and it must have been to that part of the opinion in the *D'Adamo case* that the Surrogate referred in saying that much of its reasoning "applies in the present situation" (R. 24).

It is to be remarked in passing that the statement of Mr. Fish, as quoted in that case, in reality *affirms* the right of the United States to make treaty stipulations inconsistent with the laws of the State relative to the administration and settlement of estates, for what Mr. Fish said was this (212 N. Y. 227):

> "The estates of decedents are administered upon and settled in the United States under the law of the state of which the decedent was a resident at the time of his death, and on this subject, *in the absence of any treaty regulations on the subject*, interference in the disposition of such measures as may be prescribed by the law of the particular state in such cases, is not within the province of the federal authorities."

But whatever doubt some Secretaries of State may have had, it is settled by decisions of this court that the treaty-making power of the United States *does* extend to the making of treaty stipulations which are inconsistent with the laws of the several states relating to the distribu-

tion of the property of aliens who die within their boundaries.

In *Hauenstein* v. *Lynham*, 100 U. S. 483, a treaty with Switzerland was held effectual to give to the plaintiffs-in-error land in Virginia which under the local law would have escheated to the State. The court there said:

> "That the laws of the State, irrespective of the treaty, would put the fund into her coffers, is no objection to the right or the remedy claimed by the plaintiffs-in-error" (p. 488).
>
> "A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State." (P. 489.)

In *Geofroy* v. *Riggs*, 133 U. S. 258, a treaty with France was held effectual to permit inheritance by aliens even though they would not have taken under the local law of the place where the property was situated. The court there said (p. 266):

> "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, *and the manner in which that property may be transferred, devised or inherited*, are fitting subjects for such negotiation and of regulation by mutual stipulations between tne two countries."

In *Asakura* v. *Seattle*, 265 U. S. 332, a treaty with Japan was held effectual to secure to a Japanese a right to engage in the business of pawnbroker which was denied to him by an ordinance of Seattle.

In *Nielsen* v. *Johnson*, 279 U. S. 47, a treaty with Denmark was held effectual to prevent the imposition of an inheritance tax which was authorized by the law of the State of which the decedent, a citizen of Denmark, was a resident at the time of his death; and we again call attension to the fact that the court there stated that "the treaty-making power is *independent of and superior to the legislative power of the states*" and for that reason the meaning of treaty provisions "is not restricted by any necessity of avoiding possible conflict with state legislation" and when the meaning of a treaty is ascertained it "must prevail over inconsistent state enactments." (P. 52).

The treaty-making power of the United States thus clearly extends to the making of treaties which prescribe the manner in which the property of aliens resident in a State may be transferred, devised or inherited. And such treaties, by express provision of Section 2 of Article VI of the Constitution, are "the supreme law of the land" and "the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

POINT III.

The statutes of New York, in accordance with which the courts below directed payment of the estate, are inconsistent with the treaties and hence invalid.

There is no question, of course, but that the courts below followed and applied the New York statutes. The very words of the Surrogate's opinion are that the decree shall

provide for payment of the balance of the estate into the treasury of the City of New York "*pursuant to the statute of 1898* which regulates the duties of the Public Administrator in the disposition of the funds held by him" (R. 24). The Surrogate also stated that "ultimately the amount would find its way into the Treasury of the State of New York" (R. 22). His decree follows his opinion (R. 4, 5).

It is equally clear that the New York statutes which were so followed and applied are *inconsistent* with the treaties.

The statute of 1898 to which the Surrogate referred in his opinion is Chapter 230 of the Laws of New York of 1898, and subdivision 14 of Section 24 thereof provides that the balance of any money in the hands of the public administrator on the adjustment of his accounts "whether payable to persons unknown or if known whose places of residence are unknown, shall be paid immediately into the treasury of the city."* After remaining there for twenty years the fund is then paid to the Treasurer of the *State* of New York (*Matter of People* v. *Maltbie*, 102 N. Y. Misc. 575, affirmed 184 App. Div. 743, and 226 N. Y. 641, which construes Section 44 of the *State Finance Law* as applying to funds so deposited by the Public Administrator of New York County).

It is true that while the fund is in the possession of the treasury of the city, and also after it is paid to the Treasurer of the State, it is subject to being paid out to next of kin of the decedent if any appear; but if there be no next of kin the fund *becomes the property of the State of New York as by escheat*. That was the position taken by the Attorney General in *Matter of People* v. *Maltbie*, *supra* (102

*See Statement as to Jurisdiction, pp. 13, 14, for full quotation of the statute.

Misc. at p. 577) and is in accord with the law of New York as laid down in *Johnston* v. *Spicer*, 107 N. Y. 185, 196-201.*

By the statutes of New York, therefore, the fund is retained in New York and reverts to the State of New York. By the treaties, on the other hand, the appellant is entitled to have the fund immediately delivered to him "so that he may dispose of them in accordance with the laws of his country," *i. e.*, in accordance with the laws of Italy; and by the law of Italy the property reverts to Italy (R. 6).

The inconsistency between the statutes and the treaties is thus manifest. Under the former New York gets the property, whereas under the latter Italy gets it; and for the reasons and upon the authorities stated in Point II, *supra*, this inconsistency between the treaties and the statutes makes the statutes invalid.

POINT IV.

The courts below, in substance and effect, have denied the validity of the treaties.

Although the Surrogate's opinion proceeds, in part, upon the ground that the treaties are to be interpreted as limiting appellant's consular rights "to the receipt of the property of a national of Italy dying here but domiciled in that country" (R. 24), his final conclusion was that:

> "In this proceeding the *rights granted by the treaty* must be held to be *subordinate* to the succession statutes of our State." (R. 24.)

*In its original and technical sense, the term *escheat* was applicable only to real estate, but the doctrine is applied to personalty as well; and the personal estate of persons dying intestate without next of kin reverts to the State (*Johnson* v. *Spicer*, *supra*, and see 21 Corpus Juris 851 for a full discussion of the subject and the citation of numerous authorities. Compare, also, *American Loan and Trust Co.* v. *Grand Rivers Co.*, 159 Fed. 775).

The Surrogate thus *in terms* subordinated the treaties to the statutes, and thereby in effect denied the validity of the treaties.

But even if the last-quoted expression of the Surrogate be disregarded—even if there were no express assertion of the invalidity of the treaties—the fact nevertheless remains that the necessary effect of the decree is to deny the rights asserted under the treaties. It is not necessary, in order to constitute a decision against the validity of a treaty, that the ruling shall have been put in direct terms. If the necessary effect of the decree has been to deny the claim made under the treaty, that is enough. (See *Bryant* v. *Zimmerman*, 278 U. S. 63, 67.)

Conclusion.

The decree should be reversed with costs, and payment of the net estate to appellant should be directed.

Respectfully submitted,

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Counsel for Appellant.

September, 1931.

Appendix.

(U. S. Rev. Stat. § 1709; U. S. Code, Title 22, § 75.)

§ 75. *Estates of decedents generally; General Accounting Office as conservator.*—It shall be the duty of consuls and vice-consuls, where the laws of the country permit—

First. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

Second. To inventory the same with the assistance of two merchants of the United States, or, for want of them, of any others at their choice.

Third. To collect the debts due the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted.

Fourth. To sell at auction, after reasonable public notice, such part of the estate as shall be of perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

Fifth. To transmit the balance of the estate to the Treasury of the United States, to be holden in trust for the legal claimant; except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands, they shall deliver them up, being paid their fees and shall cease their proceedings.

Sixth. The General Accounting Office shall act as conservator of such part of these estates as may be received

at the Treasury, and for its protection the Secretary of the Treasury may order such effects to be sold as may consist of jewelry or other articles which have heretofore or may hereafter be received at the Treasury, and pay the expenses of such sale out of the proceeds, provided application for these effects shall not have been made by the legal claimant within two years after their receipt. The General Accounting Office is authorized to indorse all bills of exchange, promissory notes, and other evidences of indebtedness due to such estates, and to take such steps as may be necessary for their collection. The proceeds of such sales, together with such other moneys as may be collected by it, shall be deposited into the Treasury in trust for the legal claimant, and be reported to the Secretary of State. (R. S. § 1709; Mar. 3, 1911, c. 223, 36 Stat. 1083; June 10, 1921, c. 18, § 304, 42 Stat. 24.)

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